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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

19 CR 374 (JMF)

MICHAEL AVENATTI,

Defendant.

New York, N.Y.  
October 14, 2021  
12:05 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the  
Southern District of New York

ROBERT SOBELMAN

MATTHEW D. PODOLSKY

Assistant United States Attorneys

DAVID PATTON

FEDERAL DEFENDERS OF NEW YORK

Attorney for Defendant

BY: ANDREW JOHN DALACK

TAMARA LILA GIWA

ALSO PRESENT:

RUBY KRAJICK, SDNY Clerk of Court

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(Case called)

MR. SOBELMAN: Robert Sobelman and Matthew Podolsky, for the United States. Good afternoon, your Honor.

MR. DALACK: And good afternoon, your Honor. Andrew Dalack and Tamara Giwa, from the Federal Defenders of New York, on behalf of Michael Avenatti. Robert Baum was unable to make it today, so we'll be here in his stead.

THE COURT: All right. And, Mr. Avenatti, are you on the telephone with us?

THE DEFENDANT: Yes, your Honor. Good afternoon. I am.

THE COURT: Good afternoon.

If at any point, you have any trouble hearing or get disconnected, I understand that my deputy has advised you to text your lawyer so that he can immediately notify us.

Understood?

THE DEFENDANT: Yes, sir. Yes, your Honor.

THE COURT: All right. Very good.

We are joined here by the Clerk of Court and a member of the jury department, and I thank them for being with us.

What I want to talk about is a trial date and, in particular, jury selection and complications relating to it in this time of COVID that we are in.

Here's the issue: I think, realistically, if we are going to use a questionnaire – and I will have more to say on

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1 that in a moment — I don't think January 10th is a feasible  
2 date because, as you know, assuming that COVID protocols remain  
3 in place, we can only do jury selection for one case per day,  
4 and in a case that requires a questionnaire, it requires  
5 multiple days, and given the way that things are working,  
6 basically, require sort of stretching it out over a matter of  
7 weeks to use days that would otherwise not be allocated to  
8 another case, and it's it too late to begin the process in  
9 December because Q4 trials are already scheduled. So,  
10 realistically, I think if we were to begin this in early  
11 January -- and I should say if the protocols remain in place,  
12 this is all contingent on my getting a trial date that I  
13 request in the first place. If I don't, then it's sort of a  
14 moot point. But if we were to begin with a questionnaire in  
15 early January, I think, realistically, it would take several  
16 weeks for the process to run its course, and the trial,  
17 therefore, wouldn't start until a little bit later, even as  
18 early as the beginning of February.

19 So I think that presents us with two options, as far  
20 as I can see, although part of the reason the Clerk of Court is  
21 here, and I asked members of the jury department to be here, is  
22 just in case I had questions and there were other ideas that  
23 hadn't occurred to me that came up.

24 I think one is not to use a questionnaire, which is,  
25 candidly, what I'm leaning toward doing. I'm leaning toward

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1 that for three reasons.

2 One, because it would, I think, solve the problem that  
3 I just mentioned and enable us to stick with the trial date,  
4 assuming, of course, that I get that trial date, if requested.

5 The second is that I am heavily influenced by the fact  
6 that Judge Oetken managed to pick a jury in the case that he  
7 began this week in a single day without a jury questionnaire,  
8 and that case, obviously, involved high-profile figures and  
9 issues not dissimilar to this, and nevertheless, he managed to  
10 do it, and I don't think anybody has raised concerns or  
11 questions about that process or the speed with which he managed  
12 to do it.

13 The third is the passage of time. Candidly, this case  
14 will come to trial, if I get that trial date in January of  
15 2022, two to three years after it was originally charged,  
16 several years after Mr. Avenatti and Ms. Daniels were sort of  
17 prominently in the news, President Trump is no longer President  
18 of the United States. I just think that it's not quite as  
19 front and center for many people as it may have been a few  
20 years ago. All of which leads me to think that we can do this  
21 without a questionnaire. I'll obviously engage in  
22 appropriately searching oral voir dire, and to the extent that  
23 there were concerns about jurors' answers in front of other  
24 jurors, we can use, as appropriate, sidebars and the like, but  
25 my estimate is that we can selectively pick a jury in that

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1 manner without a questionnaire and then stick with the trial  
2 date.

3 The other option would be to adjourn the trial or  
4 start jury selection at some point perhaps in January and  
5 effectively adjourn the beginning of trial until February or  
6 even later in the quarter so that we can plan accordingly.

7 So those are sort of the two options. Again, my  
8 strong instinct is that we should just do away with the  
9 questionnaire and deal with whatever needs to be dealt with  
10 orally in voir dire, but I'm obviously eager to hear your  
11 views.

12 I have found that it is, in a time of masks, a lot  
13 better if you remain seated and just pull the microphones close  
14 to you, speak directly into them. It would also enable those  
15 who were on the public line and also Mr. Avenatti to hear what  
16 you're saying. So I'm happy to hear from the government first  
17 or defense counsel, it doesn't really matter to me, but  
18 Mr. Sobelman?

19 MR. SOBELMAN: Thank you, your Honor.

20 The government's comfortable proceeding without a  
21 questionnaire, and we would defer to the Court on the timing of  
22 the trial. We are ready to try the case at the Court's  
23 convenience. It has been pending for some time. We do have a  
24 victim interested in proceeding and obtaining justice, and so  
25 our preference would be to proceed on the calendar as set, but

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1 if the Court found it appropriate to adjourn the trial, we  
2 wouldn't object.

3 THE COURT: All right.

4 Just out of curiosity, does your estimate of the trial  
5 length remain the same? The last we discussed this, the  
6 parties estimated up to two weeks, maybe one week for the  
7 government's case, one week for defense case. I think I  
8 expressed my view that this could probably be tried even more  
9 quickly than that, but, in any event, your thoughts on that?

10 MR. SOBELMAN: Yes, your Honor, our estimate remains  
11 the same.

12 THE COURT: Okay.

13 Mr. Dalack?

14 MR. DALACK: Yes, your Honor. Thank you.

15 Our position is that a questionnaire is still very  
16 much necessary in this case, and we are unwilling to proceed  
17 without a questionnaire, and so our preference would be to  
18 adjourn the trial date and to stick with the questionnaire. I  
19 say this for two reasons:

20 First, understanding the Court's points about the  
21 passage of time and the fact that Judge Oetken just picked a  
22 jury in a high-profile case without a questionnaire, we think  
23 this case is different. We think this case is different  
24 because Mr. Avenatti's legal situation has continued to garner  
25 significant media attention. There are individuals who have

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1 made statements about this case in the media and publicly. We  
2 think that that has an effect on the jury pool.

3 And having already had two trials so far in this sort  
4 of COVID era, I can say that as difficult as it is to select a  
5 jury under normal circumstances, it is very difficult to do so  
6 in the sort of large chamber that is available to the Court to  
7 select a jury. So we would have some serious concerns about  
8 sort of an oral voir dire process only in this case, where we  
9 expect that the jurors are going to arrive to the courthouse  
10 with a lot of preconceived notions and strong feelings  
11 potentially about Mr. Avenatti, given the fact that he's  
12 already been convicted in one case, basically a trial out in  
13 California, so we still very much think that a questionnaire is  
14 necessary, and if it's a choice between the January 10th date  
15 or a questionnaire, we are unquestionably on the side of a  
16 questionnaire.

17 THE COURT: All right. Let me ask you a few  
18 questions.

19 First of all, I assume you don't think it is legally  
20 required to use a questionnaire, that that's an issue within my  
21 discretion; is that correct?

22 MR. DALACK: I agree with the Court that it is an  
23 issue within the Court's discretion, and it's not legally  
24 required, per se. I think that in the context of this case,  
25 the parties originally agreed on a questionnaire because the

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1 parties were on the same page that a questionnaire was likely  
2 necessary to obtain a fair and impartial jury and to make sure  
3 that we were sort of selecting jurors from a pool of people who  
4 were not coming into this case with strong preconceived notions  
5 about Mr. Avenatti one way or the other.

6 THE COURT: All right. Although I would say two  
7 things on that score: One is that agreement was in the spring  
8 of 2020, and this case will come to trial almost two years  
9 later, and, in that sense, the circumstances are not the same  
10 separate and apart from whether it would require an adjournment  
11 and raise complications that wouldn't have two years ago.

12 The second is I looked back at the transcript where  
13 this issue first arose in February of 2020, and I know  
14 Mr. Avenatti, before you were counsel, had filed a motion  
15 requesting that jury questionnaire, but I don't think there was  
16 any argument a questionnaire was necessary; it was just the  
17 parties' position that it might be helpful and sort of left it  
18 to me. I take it you remain of that view. Is that correct?

19 MR. DALACK: It's hard, your Honor, because we were  
20 not, obviously, the attorneys of record at the time that that  
21 decision was made. So our position at this particular point is  
22 that we do think a questionnaire is likely necessary to obtain  
23 a fair and impartial jury in this case.

24 Again, your Honor's point about the passage of time is  
25 well taken, but I would like to reference, for example, in the



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1 context of the Rule 12 motions that we filed, there was some  
2 media coverage of that, and also statements that were made by  
3 interested individuals about the nature of our motions and  
4 their merits. When Mr. Avenatti's financial affidavit was  
5 unsealed, that garnered some significant media attention. When  
6 he obtained the mistrial in California --

7 THE COURT: I got it. I'm not suggesting that he is  
8 an unknown figure -- there's no question that he and his cases  
9 are the subject of some media attention -- but I also think that  
10 with the passage of time, there's not quite as much attention  
11 or notoriety as there may have been two or three years ago, and  
12 I don't anticipate that this is going to be front page news.  
13 Maybe it will, I don't know. In any event, I also doubt that  
14 it will garner more attention than Judge Oetken's case has,  
15 which obviously implicates Mr. Giuliani, Mr. Trump, any number  
16 of high-profile figures and has been subject of quite a bit of  
17 coverage and attention as well.

18 So I hear you. I'll tell you what, I'll take it under  
19 advisement. I think I'm strongly inclined, as you can probably  
20 tell, to just doing this orally and not using a written  
21 questionnaire, but, Mr. Dalack, if you want an opportunity to  
22 submit something in writing that persuades me why it's either  
23 legally required or you think appropriate or necessary, I'm  
24 certainly happy to take it under consideration. I think we  
25 need to do that swiftly because the deadline to request a jury

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1 date for Q1 of 2022 is November 15th, so I would need to figure  
2 this out sooner rather than later so that I can adjust the  
3 trial date if I decide that it is necessary or submit it  
4 regardless.

5 MR. DALACK: Yes, your Honor.

6 Can I address two of those points?

7 THE COURT: Sure.

8 MR. DALACK: We would certainly welcome the  
9 opportunity to put something before the Court in writing and  
10 could get something to your Honor within the next couple of  
11 weeks. I'm happy to set a deadline now, if that's okay with  
12 the Court.

13 THE COURT: Sure. Can you do it by next Friday?

14 MR. DALACK: That would be Friday --

15 THE COURT: The 22nd.

16 MR. DALACK: The 24th?

17 THE COURT: 22nd.

18 MR. DALACK: I'm sorry, your Honor. 22nd, yes, we can  
19 do that.

20 THE COURT: Okay, great.

21 If the government wishes to respond, it can respond,  
22 let's say, by Tuesday, the 26th, but if you don't take a  
23 position on the issue and don't want to file anything, that's  
24 fine.

25 Yes?

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1 MR. DALACK: Yes, the second point is, we would also  
2 welcome some insight, to the extent the Court's able to provide  
3 it, about -- it's not clear to us that there's necessarily a  
4 tension, per se, between a questionnaire and selecting a trial  
5 date in Q1 of 2022. Has the Court submitted the January 10th  
6 date and it's been denied? Or what's --

7 THE COURT: No. The deadline is November 15th.

8 MR. DALACK: I see.

9 THE COURT: So I haven't submitted any requests for  
10 Q1, and I genuinely don't know if I request the January 10th  
11 date, how likely it is that I would even get it. As you  
12 probably know, there are certain criteria that we use to  
13 prioritize certain -- to determine the order of priority, and  
14 criminal is usually a higher priority than civil, or it is a  
15 higher priority than civil, but detained defendants are higher  
16 priority than nondetained and so on and so forth. So I just  
17 don't know what other requests will be made for this date. I  
18 just don't know.

19 MR. DALACK: If I could propose maybe a compromise or  
20 alternative for the Court's consideration?

21 THE COURT: Sure.

22 MR. DALACK: I think it would be possible, based on my  
23 experience, limited experience, with using jury questionnaires,  
24 to have the jury or the pool of prospective jurors come in on a  
25 particular date to complete the questionnaires, and then, from

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1 that point on, if we were to, for example, request or obtain a  
2 trial date in March of 2022, have the pool of jurors come in in  
3 January or February to complete the questionnaire, have that  
4 all sorted out then, and then proceed to jury selection in time  
5 for a March 2022 trial date? I guess my point is, we don't  
6 necessarily think that a questionnaire and the Q1 trial 2022  
7 date are in tension.

8 THE COURT: I generally agree with that. I didn't  
9 mean to suggest, and if you heard me suggesting it, let me  
10 correct the misimpression. I didn't mean to suggest that a Q1  
11 date was unrealistic if we use a questionnaire. I just don't  
12 think January 10th is realistic.

13 MR. DALACK: Understood.

14 THE COURT: I think at the earliest, we could begin  
15 the process of distributing a questionnaire in January, but  
16 because it would require multiple days and because of the COVID  
17 restrictions, that would basically need to happen over the  
18 course of several weeks. I think, realistically, the earliest  
19 the trial could begin would be in February and maybe not even  
20 then.

21 I will raise one other concern, which is that, not  
22 surprisingly, I have a huge blog of criminal cases, including  
23 several very lengthy criminal trials. I have two of them  
24 scheduled to begin on the same day of March 7th. So moving  
25 this to March is not really a -- would not be a welcome

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1 development for my purposes, so I'm going to try and avoid  
2 that.

3 In any event, I think, if I'm making myself clear, I  
4 think the two alternatives -- if you come up with other  
5 creative solutions, you can include them in your letter by next  
6 Friday. I think the two solutions are either to proceed  
7 January 10th, again, contingent on my getting that date in the  
8 COVID request process without a questionnaire, or using a  
9 questionnaire and adjudge that trial would actually begin  
10 probably sometime in February, perhaps March, perhaps in front  
11 of me, perhaps in front of another judge, depending on my  
12 conflicts or the like. So I think those are probably the two  
13 options.

14 Any questions, Mr. Dalack?

15 MR. DALACK: No questions. And if we come up with  
16 other creative alternatives, we'll be sure to front them for  
17 the Court in the letter.

18 THE COURT: Okay.

19 I know the defendant faces two trials still out in  
20 California. I don't know what the latest is on scheduling of  
21 those trials. I think I saw that there was some litigation  
22 regarding a retrial. Anything you can share on that front, to  
23 the extent that it might implicate our schedule as well?

24 MR. DALACK: Just that there is ongoing litigation  
25 with respect to the retrial that I believe is currently

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1 scheduled for November, and if I'm not mistaken, the second  
2 trial might be scheduled for sometime in the spring of 2022,  
3 but I'm not a hundred percent sure about that, your Honor. But  
4 all of that is subject to pending litigation in front of the  
5 Ninth Circuit concerning a motion that Mr. Avenatti made out  
6 there concerning the constitutionality of a retrial in that  
7 case.

8 THE COURT: All right.

9 I have May 2022 in my head as the date of the second  
10 trial. I don't know --

11 MR. DALACK: That's my understanding as well, your  
12 Honor, yes.

13 THE COURT: Okay. Very good.

14 Let me just check with the Clerk of Court and see if  
15 she has anything she wants to share with me or if we're good?

16 MS. KRAJICK: We're good.

17 THE COURT: All right. I think we're good.

18 So I will reserve judgment on whether to proceed  
19 without a written questionnaire until I see what, if anything,  
20 the defense submits by next Friday, and then put in a request  
21 accordingly. If we need to reconvene to talk about other  
22 dates, we'll reconvene. The bottom line is the work in  
23 progress.

24 To be clear, I think the deadline -- the clerk can  
25 correct me if I'm wrong about this -- the deadline is

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1 November 15th. I don't think the calendar will be set until  
2 probably later in the month of November, but whatever we settle  
3 on, I'll put in a request by November 15th. We probably won't  
4 know until late November, and as you probably know, if we're  
5 not first in the queue, it's contingent on whatever cases are  
6 ahead of us going away. The clerk can tell me if she has  
7 anything she wants me to add or correct to that, but I think  
8 that's all accurate.

9 MS. KRAJICK: I do not, your Honor. You're correct on  
10 everything.

11 THE COURT: Great. Thank you very much.

12 We are adjourned.

13 MR. DALACK: Thank you, Judge.

14 \* \* \*